

A **TETUAN LIM & KEONG v. TOO JIAO YANG**
HIGH COURT MALAYA, KUALA LUMPUR
MOHD ARIEF EMRAN ARIFIN J
[CIVIL APPEAL NO: WA-12BNCVC-8-01-2023]
21 NOVEMBER 2023

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Abstract – *Although ample latitude is given to a litigant to amend his pleadings or present his case before the court, such rights can be denied if there is a delay without reasonable explanation by the litigant to file the application for amendment or to give effect to the court's directions given during case management.*

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CIVIL PROCEDURE: *Appeal – Appeal against decision of Sessions Court – Solicitors found guilty of fraudulent misrepresentation and ordered to pay damages – Whether Sessions Court Judge erred in arriving at decision – Whether solicitors breached terms of stakeholder agreement – Whether solicitors bound by terms of stakeholder agreement – Whether solicitors denied of natural justice to call witnesses – Whether solicitors complied with all directions of Sessions Court during case management – Whether damages ordered to be paid excessive*

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CIVIL PROCEDURE: *Pleadings – Amendment – Solicitors applied to amend defence and add counterclaim one day before commencement of trial – Whether application ought to be allowed – Whether reasonable explanation tendered for delay in filing application*

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LEGAL PROFESSION: *Solicitors – Stakeholders – Whether solicitors breached terms of stakeholder agreement – Whether solicitors bound by terms of stakeholder agreement – Whether solicitors denied of natural justice to call witnesses – Whether solicitors complied with all directions of Sessions Court during case management – Whether damages ordered to be paid excessive*

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The appellant was a legal firm acting on behalf of a company holding a sports Toto licence, while the respondent was a party interested in acquiring the said licence. For acquiring the licence, the respondent agreed to purchase the shares of the company. The agreed purchase price was set at RM1.4 million, with a deposit of RM300,000 to be paid prior to the commencement of the acquisition process. Pursuant to a counter proposal by the respondent, the following terms were agreed by the parties: (i) the deposit shall be paid to the appellant as stakeholder pending the completion of a due diligence to be conducted for the acquisition; (ii) the deposit shall only be released upon the completion of the acquisition process; and (iii) the deposit shall be refunded to the respondent if the acquisition process was aborted. Subsequently, the respondent issued a cheque for the sum of RM300,000 to the appellant to be kept by the same as stakeholder ('stakeholder sum'). However, after the conduct of the due diligence, the respondent discovered that the licence was

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not actually held by the company, but by a person known as 'Law Chin Boo' and that the same could not be transferred without the consent of the Ministry of Finance. This prompted the respondent to terminate the acquisition and requested for the refund of the stakeholder sum. The appellant, which had been subsequently terminated of its services by the company, was instructed by the company (through their newly appointed solicitors, Messrs Oh Teik Keng & Partners ('new solicitors')) to refund the stakeholder sum to the respondent in full. The appellant refused the instruction and continued to hold the stakeholder sum until it was released to four different individuals as well as the company. Therefore, the respondent initiated an action against the appellant at the Sessions Court. After a trial, a judgment was entered against the appellant which the appellant was ordered to make, among others, payments of RM40,000 being the damages or costs for the aborted acquisition/due diligence costs and general damages of RM60,000 for an alleged misrepresentation made to the respondent that the appellant was the solicitors acting for the company ('Sessions Court's decision'). Aggrieved, the appellant filed two appeals against the said decision. In the first appeal, the appellant sought to challenge the Sessions Court Judge's ('SJ') decision of not allowing the appellant's application to amend its defence and add a counterclaim which was filed a day prior to the commencement of the trial. Whereas in the second appeal, the appellant contended that the SJ was plainly wrong in its findings because of the: (i) failure to consider that the appellant was entitled to release the stakeholder sum; (ii) failure to consider that there was a breach of natural justice; the appellant was denied the right to call four additional witnesses; and (iii) failure to consider the respondent had failed to prove their claim for misrepresentation against the appellant.

Held (allowing appeals in part):

- (1) There was no explanation afforded or attempted by the appellant to explain why the application to amend its defence and add a counterclaim was filed late. The appellant's affidavit only contained seven paragraphs and did not explain why the said application was necessary and why the appellant waited at the last minute before the amendments were proposed. The appellant also did not disclose the full particulars justifying the amendment and did not produce sufficient evidence in its affidavit to show the chances of success of the proposed amendments. Therefore, the SJ had not committed any error justifying appellate interference. The first appeal was hence dismissed with costs. (paras 9-12)
- (2) Through a letter dated 23 September 2021, the appellant had accepted the terms of the respondent's counter proposal. Although para. 2(d) had not been accepted, other clauses had been agreed to. The appellant, being a firm of solicitors, was subject to the term of undertaking and could not resile on what had been agreed upon. Hence, it was irrefutable

- A that the appellant could not deny that they were obliged to keep the deposit on the undertaking that the same would not be released until the due diligence was finalised. The stakeholder sum therefore should not have been released and there was no evidence that the respondent had agreed to waive this condition. In the circumstances, there was no error
- B justifying appellate intervention on this issue. The appellant should have followed the terms of the stakeholder and withstood any attempt by any party to have the sums released to them. Even if these sums were to be released, the appellant should have obtained written confirmation from the respondent's solicitors to waive the stakeholder condition.
- C Otherwise, the appellant would be incurring personal liability for breaching the terms of the stakeholder agreement. (paras 26, 28, 31 & 32)
- (3) The appellant had not complied with any of the directions given by the SJ during case management. No list of witnesses, bundle of documents and witness statements had been filed. During trial, the appellant also
- D did not tender any list of witnesses, witness statements or identified who the witnesses they intended to call. The appellant only stated that they wanted to call four individuals as witnesses. In fact, even until today, the appellant had not identified who were these four individuals and what they would establish to assist the appellant's case. There was a
- E complete disregard of all directions given by the Sessions Court without any reasonable explanation tendered to justify the indolent behaviour. Despite this, the appellant had still been given ample opportunity to present its case and give evidence. Considering these and the fact that
- F the appellant was a firm of advocates and solicitors, and a seasoned litigator well-versed with the legal process, there was no reasonable explanation that could justify the delay by the appellant to comply with the Sessions Court's directions. As such, no appellate intervention ought to be applied on this issue. (paras 36-41)
- G (4) The decision of the Sessions Court that the appellant had misrepresented his authority could not be sustained. The evidence showed that the appellant had, in fact, acted for Law Chin Boo but was subsequently replaced by the new solicitors as could be seen in a letter dated 7 February 2022. Otherwise, the new solicitors would not have used the words 'erstwhile solicitors'. It was undisputed that Law Chin Boo was
- H the party holding the licence and the sum of RM50,000 was paid to him by the appellant. These coupled with the factor that Law Chin Boo was not produced by the respondent to explain on the WhatsApp conversations and the contents of the letters corresponded between the appellant and the new solicitors, it was held that this was a suitable case
- I for exercising appellate interference. The SJ should not have made the finding on liability on the issue of fraudulent misrepresentation and the claim for the loss arising from the due diligence expense claimed by the respondent. (paras 53-54 & 60)

- (5) The second appeal was allowed on the part concerning the claim for damages. Considering that the appellant was not guilty of fraudulent misrepresentation, but only of wrongly releasing the stakeholder sum, the appellant should not be held liable for the costs of due diligence incurred by the respondent. However, it was confirmed that the appellant was liable to pay the respondent the sum of RM300,000 and RM10,000, respectively, for the said wrong and as exemplary damages. (paras 61 & 62)

Case(s) referred to:

- Beyond Hallmark Sdn Bhd v. Leong Tuck Oon & Anor* [2018] CLJU 2222; [2018] 1 LNS 2222 HC (*refd*)
- Butler Machine Tool Co Ltd v. Ex-Cell-O Corporation (England) Ltd* [1979] 1 WLR 401 (*refd*)
- Datuk M Kayveas & Anor v. Bar Council* [2013] 7 CLJ 533 FC (*refd*)
- Hong Leong Finance Bhd v. Low Thiam Hoe & Another Appeal* [2015] 8 CLJ 1 FC (*refd*)
- Mahabuilders Bhd v. Hotel Rasa Sayang Sdn Bhd* [2014] 3 CLJ 661 HC (*refd*)
- MMC Oil & Gas Engineering Sdn Bhd v. Tan Bock Kwee & Sons Sdn Bhd* [2016] 4 CLJ 665 CA (*refd*)
- Nasir Kenzin & Tan v. Elegant Group Sdn Bhd* [2009] 1 CLJ 47 CA (*refd*)
- Ng Hoo Kui & Anor v. Wendy Tan Lee Peng, Administrator Of The Estates Of Tan Ewe Kwang, Deceased & Ors* [2020] 10 CLJ 1 FC (*refd*)
- OCBC Bank (Malaysia) Bhd & Ors v. Lee Lee Fah & Ors & Another Appeal* [2000] 1 CLJ 71 CA (*refd*)
- Petronas Hartabina Sdn Bhd v. Mahmood Adam & Anor* [2003] CLJU 739; [2003] 1 LNS 739 HC (*refd*)
- Rekha Munisamy v. Ortus Expert White Sdn Bhd & Anor* [2021] 7 CLJ 353 CA (*refd*)
- T Damodaran v. Choe Kuan Him* [1979] CLJU 107; [1979] 1 LNS 17 PC (*refd*)
- Tekdata Interconnections Ltd v. Amphenol Ltd* [2010] 2 All ER (Comm) 302 (*refd*)
- Toh Theam Hock v. Kemajuan Perwira Management Corp Sdn Bhd* [1987] 2 CLJ 26; [1987] CLJ (Rep) 400 SC (*refd*)
- Yamaha Motor Co Ltd v. Yamaha (M) Sdn Bhd & Ors* [1983] 1 CLJ 191; [1983] CLJ (Rep) 428 FC (*refd*)
- For the appellant - Lim Boon Kong; M/s Lim & Keong
- For the respondent - Fong Yin Kee & Eunice Kwong; M/s Ricky Tan
- Reported by Syamim Ariffin

JUDGMENT

Mohd Arief Emran Arifin J:

Introduction

- [1] The appellant, Messrs Lim & Keong, have filed two appeals against the orders of the Sessions Court that (i) dismissed the application to amend the defence and add a counterclaim; and (ii) entered judgment against the appellant, who was the defendant, in the proceedings before the Sessions Court.

A Decision Of This Court

[2] After considering the records of appeal, submissions filed and the grounds of the learned Sessions Court Judge, I find that the Sessions Court Judge did not commit any errors with respect to the decision not to allow the amendments sought but was wrong in part of the orders entered against the appellant after trial.

[3] My reasoning for the above is stated in the following paragraphs.

Detailed Reasons Of This Court**C Appeal WA-12ANVC-299-10/2022**

Application To Amend At The Eve Of Trial – Should Not Be Allowed Unless Reasons Given

[4] The appellant sought to amend the defence and add a counterclaim by filing an application on 16 June 2022. The trial of the suit was fixed on 17 June 2022.

[5] Therefore, the application to amend was filed a day before trial and did not provide any reasonable explanation why the said application was filed late.

[6] The following material facts concerning the course of proceedings before the Sessions Court was laid down by the learned trial judge:

(i) the suit was filed on 26 February 2022;

(ii) defence was filed on 10 March 2022 and a reply was filed on 22 March 2022;

(iii) the Sessions Court had undertaken case management of the suit on 20 April 2022 and had fixed the trial to be heard on 17 June 2022. Directions were given for a common bundle of documents, exchange of witness statements as well as for the filing of the list of witnesses;

(iv) the appellant/the defendant did not file their list of witnesses and did not file the witness statements;

(v) the appellant also did not file the application to amend its defence earlier and only chose to file its amendment on the eve of the trial, a day before the date fixed for trial.

[7] I agree that it is trite law that generally ample latitude should be given to a litigant to amend its pleading if the other side is not prejudiced, and it does not change the characteristic of the defence or claim. See *Yamaha Motor Co Ltd v. Yamaha (M) Sdn Bhd & Ors* [1983] 1 CLJ 191; [1983] CLJ (Rep) 428.

[8] However, as the application was filed on the eve of the trial, this application cannot be entertained. I refer to the decision of the Federal Court in *Hong Leong Finance Bhd v. Low Thiam Hoe & Another Appeal* [2015] 8 CLJ 1; [2016] 1 MLJ 301, where Zulkefli Makinudin CJ (Malaya) as he then was held:

[25] The courts in Malaysia have consistently held that where there is a delay in making an amendment application, the onus is on the applicant to furnish a reasonable explanation for such a delay. They seem to have considered this as an additional factor to the *Yamaha Motor's* rules. The need to show “some material and advance some cogent reasons” was applied in *Taisho Company Sdn Bhd v. Pan Global Equities Bhd & Anor* [1999] 1 CLJ 703. Haidar JCA. (as he then was) held:

The learned judge intimated that the application was made after the appellant failed on appeal to this court to affirm the judgment entered by it initially. Further, he said that the appellant had knowledge of the “acknowledgement” as late as April 1987, that is, four years before the action was filed. Furthermore, the application was filed four years after the commencement of this action. *We would add further that no reasons were given for the delay in filing the application when the point of admission was obviously available even before filing the proceedings. As rightly opined by the learned JC in Multi-Pak Singapore Re Ltd and correctly followed by the learned judge, the appellant did not place some material and advance some cogent reasons to impel the court to lean on its side.* We would further add that the application borders on lack of *bona fides*, one of the basic question set out in *Yamaha Motor Co Ltd*. (emphasis added)

The requirement to advance some material and cogent reasons was likewise followed in the subsequent decisions in the cases of *Raphael Pura v. Insas Bhd & Anor* [2000] 4 CLJ 830 and *Everise Hectares Sdn Bhd v. Citibank Bhd* [2011] 2 CLJ 25.

[26] It is to be stated here the requirement that a cogent explanation for such a delay must be furnished when making a late application to amend would be clearly in line with pre-trial case management procedures (introduced in year 2000). The management of cases by the courts prior to the trial is intended to ensure “just, expeditious and economical disposal” of an action. (See O. 34 r. 4(1) of the RHC 1980 (now O. 34 r. 1(1) of the RC 2012) and the Practice Direction No. 2 of 2014 issued by the Chief Judge of High Court in Malaya). Timely disposal of cases and the limitation of cost are now the primary considerations under the present regime.

...

[33] Having considered the facts and the circumstances of the present case, our views are as follows:

- (a) When dealing with an application to amend the pleadings, which introduce a new case in the claim or defence, on the eve of the trial, the principles in *Yamaha Motor* are not the sole considerations.

- A (b) The principles in *Yamaha Motor* applies to cases where the application to amend the pleadings is made at an early stage of the proceedings.
- (c) That there has to be a cogent and reasonable explanation in the applicant's affidavit as to why the application was filed late.
- B (d) That the application to amend the pleadings is not a tactical manoeuvre.
- (e) That the proposed amendment must disclose full particulars for the court to ascertain if there is a real prospect of success in proving the same.
- C (f) That lateness in the application to amend the pleadings cannot necessarily be compensated by payment of costs.

Accordingly, our answers to question 1(a) is in the negative and as for question 1(b), the matters to be considered in considering an application to amend pleadings are as set out in sub-paras. (2) - (6) above.

- D (emphasis added)

[9] I have considered the affidavit filed by the appellant in support of the application to amend and I find that there was no explanation afforded or attempted by the appellant to explain why the said application was filed late. The said affidavit only contained seven paragraphs and did not explain why the said application was necessary and why the appellant/defendant waited at the last minute before the amendments were proposed.

[10] I also find that the appellant/defendant did not disclose full particulars justifying the amendment and did not produce sufficient evidence in the affidavit to show the chances of success of the proposed amendments.

F Conclusion For Appeal Against Decision Not To Allow Application To Amend

[11] In the circumstances, I find that the learned Sessions Court Judge did not commit any error justifying appellate interference. I find that the Sessions Court had correctly applied the law and considered the arguments put forward by the litigants. The decision is correct in law and should not be interfered with.

[12] For the above reasons, I dismiss the appeal with costs of RM5,000 subject to the allocatur to be paid by the appellant to the respondent.

H *Appeal WA-12BNCVC-8-01/2023 – After Trial*

Law On Appellate Interference – Decision After Trial

I [13] It is trite law that when dealing with an appeal after trial, this court will be slow to interfere with the findings made by the court below unless it is shown that the decision was plainly wrong that no reasonable competent judge could have arrived to the said decision based on the facts and evidence before the court.

[14] I refer to the decision of the Federal Court in *Ng Hoo Kui & Anor v. Wendy Tan Lee Peng, Administrator Of The Estates Of Tan Ewe Kwang, Deceased & Ors* [2020] 10 CLJ 1, where Zabariah Mohd Yusof FCJ held:

As long as the trial judge's conclusion can be supported on a rational basis in view of the material evidence, the fact that the appellate court feels like it might have decided differently is irrelevant. In other words, a finding of fact that would not be repugnant to common sense ought not to be disturbed. The trial judge should be accorded a margin of appreciation when his treatment of the evidence is examined by the appellate courts.

[15] I also reproduce the following paragraphs from the judgment of the Court of Appeal in *MMC Oil & Gas Engineering Sdn Bhd v. Tan Bock Kwee & Sons Sdn Bhd* [2016] 4 CLJ 665, where Nallini Pathmanathan JCA (as she then was) stated:

[14] The requirement for the trial judge to have come to a finding which was 'plainly wrong' before an appellate court may intervene is therefore well entrenched in our appellate philosophy and practice. In *Henderson v. Foxworth Investments Ltd And Another*, Lord Reed considered the meaning to be accorded to the phrase 'plainly wrong':

... there may be some value in considering the meaning of that phrase. There is a risk that it may be misunderstood. The adverb 'plainly' does not refer to the degree of confidence felt by the appellate court that it would not have reached the same conclusion as the trial judge. It does not matter, with whatever degree of certainty, that the appellate court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached.

[15] This is a point of some importance because it underscores the rationale that the appellate court is not at liberty to reverse or interfere in the finding of a trial judge even if the appellate court is clearly of the view that it would not have reached the conclusion the trial judge did on the evidence on record before it. It requires something more. The requisite or correct standard to be applied is that no reasonable judge, on the evidence on record, could have reached the conclusion of the trial judge. In other words, so long as the findings of the trial judge are plausible on the evidence on record, there is no room for interference merely on the grounds that the appellate court forms a different opinion on the same evidence.

[16] There is, however, little room for variation in the application of the principle of intervention when the trial judge is 'plainly wrong'. Appellant courts ought to be consistent in ensuring that appellate intervention only comes about when a trial judge reaches a conclusion which no reasonable judge could have reached. A lack of such consistency in approach would give rise to considerable uncertainty in the practice and progress of litigation. Litigants through their counsel should be able to assess with some degree of certainty, on clear and distinctly applied principles of law,

- A whether a judgment obtained at first instance is likely to be overturned or not. This is only possible if there is a consistent application of the 'plainly wrong' principle underlying appellate intervention.
- B [17] The obverse or counterpart to the requirement for appellate restraint in dealing with findings of fact by the trial judge is the fundamental requirement that the judgment of first instance does in fact amount to a comprehensive and cohesive determination of the material matters comprising the subject matter of dispute before the trial judge. This requires the trial judge to undertake a full evaluation of the evidence and issues placed before the court. A first instance judgment is open to challenge when it fails to address or wholly ignores material evidence or
- C issues placed before it, or when bald findings of fact are made with no reasoning or evidence to substantiate such findings. Equally errors of law, a clear misunderstanding of relevant evidence and such clearly identifiable errors will all contribute towards a decision that would be considered to be 'plainly wrong'.
- D [18] Judicial decisions are required to be handed down expeditiously and with minimum delay. However this ought not to compromise the fundamental requirement that trial judges undertake a comprehensive and holistic approach to the evaluation of evidence in reaching their findings at first instance. A failure to consider the entirety of the evidence and material issues, a failure to make findings of fact or the making of bare
- E findings of fact, all allow for appellate intervention. Apart from the real possibility of a miscarriage of justice, such omissions by a trial judge require the appellate courts to take on the role of first instance judges and review the evidence in its entirety afresh. This in turn amounts to a strain on judicial resources. The importance of a comprehensive consideration of the matter at first instance cannot be sufficiently emphasised. Equally
- F when there has been just such a holistic approach adopted, there should be considerable appellate restraint exercised when reviewing a first instance judgment on appeal.

Background Facts

- G [16] The appellant was acting as the solicitors for the vendor of a sports toto license held at Jalan Pasar Baharu, Kuala Lumpur. The appellant had stated by letter dated 10 September 2021 that their clients were willing to sell the shares in the company that held the said license for the price of RM1.4 million and that a deposit of RM300,000 is paid to commence the acquisition process of the said shares.
- H [17] The respondent's solicitors responded with a letter dated 14 September 2021 indicating that the respondent was interested in purchasing the said company with conditions. The appellant responded to the letter as seen in the correspondence dated 21 September 2021. This letter
- I contained a counter-offer to the previous offer dated 14 September 2021.

[18] The respondent did not agree to the counter-offer made by the appellant and issued a letter dated 23 September 2021 that contains a counter proposal which are as follows: A

2. Kindly take note that we have been instructed by our client to counter propose and State that our client is agreeable to pay the deposit in the sum of RM300,000.00 to you to hold as stakeholder pending the due diligence to be conducted and the completion of the acquisition process subject to the following terms that: B

(a) The monthly average sale of the company for year 2019 shall be in the sum of RM600,000.00 and your client shall provide us the supporting evidence on commissions received from Sports Toto to our client to prove the same; C

(b) The license from Sports Toto obtained by the said company shall remain valid during and after the acquisition process of the said company which is in progress;

(c) A guarantee from your client that the company have not breached the licensing agreement with Sports Toto and/or carried out any conduct that shall render the license from Sports Toto to be revoked; D

(d) Your client shall ensure that the tenancy with the current Landlord of the premises shall be renewed and extended with the terms that are agreeable by our client; E

(e) The deposit paid to you to hold as stakeholder shall be constituted as part payment of the Purchase Price and shall be released to your client only upon completion of the acquisition process; and

(f) The deposit shall be refunded in the event that the acquisition process of the said company is aborted. F

[19] The counter proposal was accepted by the vendor as seen in the appellant's letter dated 24 September 2021, except as item 2(d). For our purposes, the terms of the acquisition of the said license could be summarised as follows: G

(i) the deposit of RM300,000 shall be paid to the appellant as a stakeholder pending the due diligence to be conducted for the acquisition of the license;

(ii) the deposit paid to the appellant shall only be released upon completion of the acquisition process; and H

(iii) the deposit shall be refunded if the acquisition process is aborted.

[20] Pursuant to the said terms, the respondent issued a cheque for the sum of RM300,000 to be kept by the appellant as stakeholder pending the due diligence to be conducted for the purchase of the said shares. The sum was paid to the appellant as seen in the letter dated 1 October 2021 and the cheque dated 29 September 2021. I

- A [21] The respondent found that the actual sports toto license was not held by the appellant's client, the company, but was held by one known as Law Chin Boo @ Low Chin Boo and that it cannot be transferred without the consent of the Ministry of Finance. As a result, the respondent chose to terminate the acquisition and sought the return of the said deposit from the
B appellant as seen in the letter dated 16 December 2021. I also refer to the letters issued by the respondent's solicitors dated 12 January 2022, 14 January 2022 and 21 January 2022.

- C [22] The vendor decided to terminate the services of the appellant and appointed one Messrs Oh Teik Keng & Partners. The said firm issued a letter dated 26 January 2022 to the appellant instructing them:

- (i) that they now act for Mr Law Chin Boon and Mr Lim Ah Loon;
- (ii) that the vendors have decided to terminate the sale and direct that the sum paid as deposit be refunded in full to the respondent.

- D [23] The appellant however contends that the said deposit is non-refundable and that the above conditions were not agreed to by his client. He also contends that the parties agreed that the terms of the letter dated 24 September 2021 were binding on the parties. The appellant contends that the said stakeholder sum will be held by him and released to
E Miguel Wong Kim Yew, Cathay Wong Kok Thai, Bobby Lim Cheng Kee and Low Kuai Ching, as well as to the vendors. These individuals are allegedly entitled to the commission for the sale of the said license and company.

Decision Of This Court

- F *The Appellant's Defence Failed To Prove That He Was Entitled To Release The Stakeholder Sum*

- G [24] After considering the evidence before me as shown in the record of appeal, I find that the learned Sessions Court Judge did not commit any errors of law or facts on the above issues.

- H [25] The letter dated 24 September 2021, relied on by the appellant, was not accepted or agreed to by the respondent. As shown earlier, the respondent's solicitors issued a counter proposal dated 23 September 2021 that contained the following offers:

- I 2. Kindly take note that we have been instructed by our client to counter propose and state that our client is agreeable to pay the deposit in the sum of RM300,000 to you to hold as stakeholder pending the due diligence to be conducted and the completion of the acquisition process subject to the following terms that:

- (a) The monthly average sale of the company for year 2019 shall be in the sum of RM600,000.00 and your client shall provide us the supporting evidence on commissions received from Sports Toto to our client to prove the same;

- (b) The license from Sports Toto obtained by the said company shall remain valid during and after the acquisition process of the said company which is in progress; A
- (c) A guarantee from your client that the company have not breached the licensing agreement with Sports Toto and/or carried out any conduct that shall render the license from Sports Toto to be revoked; B
- (d) Your client shall ensure that the tenancy with the current Landlord of the premises shall be renewed and extended with the terms that are agreeable by our client;
- (e) The deposit paid to you to hold as stakeholder shall be constituted as part payment of the Purchase Price and shall be released to your client only upon completion of the acquisition process; and C
- (f) The deposit shall be refunded in the event that the acquisition process of the said company is aborted.

[26] This offer was accepted by the appellant by letter dated 24 September 2021. I accept that para. 2(d) was not accepted but the other clauses were agreed to. The most important consideration is that the license must belong to the company, the subject matter of which would be the acquisition consideration for the payment of the purchase price. The other material consideration is that the stakeholder sums cannot be released until the acquisition process is complete. In other words, parties were *ad idem* on the issue of the stakeholder sum/deposit. This sum cannot and should only be released by the appellant to any party until the due diligence process is completed. D
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[27] It is trite law that in a battle of the forms, it is the duty of the court to assess the evidence objectively to consider whether parties are in *ad idem* as to the material terms of the contract or agreement. This is to be looked at objectively based on the conduct and documents exchanged between the parties. See *Mahabuilders Bhd v. Hotel Rasa Sayang Sdn Bhd* [2014] 3 CLJ 661; *Tekdata Interconnections Ltd v. Amphenol Ltd* [2010] 2 All ER (Comm) 302 and the *locus classicus* *Butler Machine Tool Co Ltd v. Ex-Cell-O Corporation (England) Ltd* [1979] 1 WLR 401. F
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[28] As such, the Sessions Court is correct to have found that the parties did agree to the terms as stated in the letter 23 September 2021. The appellant, being a firm of solicitors, would also be subject to the terms of undertaking and cannot resile on what was agreed upon. I refer to the decision of the Privy Council in *T Damodaran v. Choe Kuan Him* [1979] CLJU 107; [1979] 1 LNS 107 where Lord Diplock held: H

The terms of the solicitor's undertaking are clear, unqualified and unequivocal. The event on the happening of which the money was to be paid took place on 16 April 1974, when the transfer of the lands was "duly registered in the name of the purchaser Messrs Syarikat Alor Merah Sdn. Bhd." The failure to pay the balance I

- A of \$182,200 is, on the face of it, a plain breach of the undertaking. There would seem to be no reason why in the instant proceedings, commenced on 30 July 1974, by originating summons against the solicitor to enforce the undertaking, the vendor should not recover judgment for the balance of \$182,200 with interest from 16 April 1974. (emphasis added)
- B [29] I also refer to the decision of the Court of Appeal in *Nasir Kenzin & Tan v. Elegant Group Sdn Bhd* [2009] 1 CLJ 47, where Suriyadi Halim Omar JCA (as he then was) held:
- C [18] With the letter of undertaking dated 4 December 2002 so clear, unequivocal and unambiguous, and the appellant having breached the solicitor's undertaking, we agreed with the learned judge that no triable issue had been raised by the appellant. The non-refund of the RM1 million was a clear breach of the undertaking. That being so, with the facts and antecedents as they were, this panel had not hesitated to fully endorse the decision of the learned judge that this was a fit and proper case for summary judgement (*United Mining and Finance Corporation Ltd v. Becher* [1910] 2 KB 296; *In re A Solicitor; Ex Parte Hales* [1907] 2 KB 539;
- D *T. Damodaran v. Choe Kuan Him* [1979] LNS 107; [1979] 2 MLJ 267). (emphasis added)
- I also refer to the decision of the courts in *OCBC Bank (Malaysia) Bhd & Ors v. Lee Lee Fah & Ors & Another Appeal* [2000] 1 CLJ 71; [1999] 1 MLRA 668; *Petronas Hartabina Sdn Bhd v. Mahmood Adam & Anor* [2003] CLJU 739;
- E [2003] 1 LNS 739; [2003] 7 MLRH 289; *Toh Theam Hock v. Kemajuan Perwira Management Corp Sdn Bhd* [1987] 2 CLJ 26; [1987] CLJ (Rep) 400; [1987] 1 MLRA 166; *Beyond Hallmark Sdn Bhd v. Leong Tuck Onn & Anor* [2018] CLJU 2222; [2018] 1 LNS 2222; [2018] MLRHU 1809 and *Datuk M Kayveas & Anor v. Bar Council* [2013] 7 CLJ 533.
- F [30] It is worth repeating what the Federal Court stated in *Datuk M Kayveas & Anor v. Bar Council*:
- G [31] In our system of conveyancing, "the word 'stake' is in common parlance used to apply to any money to be disposed of in accordance with what may happen in future: and whoever is in possession of the money is often described as a stakeholder. The manner in which the money is to be disposed of depends on the terms on which it is held" (*Toh Theam Hock v. Kemajuan Perwira Management Corp Sdn Bhd* [1987] 2 CLJ 26; [1987] CLJ (Rep) 400; [1988] 1 MLJ 116 per Hashim Yeop A Sani SCJ, as he then was, delivering the judgment of the former Supreme Court). "Solicitors who hold funds which are paid to them as stakeholders hold those funds as trustees for the client, whose property the funds remains at all times. Such funds are not held in a contractual or quasi-contractual capacity" (*Halsbury's Laws of England* 4th edn. reissue vol. 44(1) para. 126). "... the obligations arising under a solicitor's undertaking go beyond contractual effect. They are obligations which a solicitor has a professional duty, as well as a contractual duty, to observe" (*Bentley and Another v. Gaisford* [1997] 1 All ER 842, 848 per Sir Richard Scott VC).
- I When solicitors hold funds as stakeholders, they hold those funds as

trustees and not in a contractual or *quasi*-contractual capacity (see *Alimand Computer Systems Ltd v. Radcliffes & Co*, The Times 6 November 1991). “If an estate agent or solicitor, being duly authorised in that behalf, receives a deposit ‘as stakeholder’, he is under a duty to hold it *in medio* pending the outcome of a future event. He does not hold it as agent for the vendor, nor as agent for the purchaser. He holds it as trustee for both to await the evidence: see *Skinner v. Trustee of Property of Reed* [1967] 2 All ER 1286 at p. 1287, [1967] Ch 1194 at p. 1200) per Cross J. Until the event is known, it is his duty to keep it in his own hands; or to put it on deposit at the bank ...” (*Burt v. Claude Cousins & Co Ltd* [1971] 2 QB 426 per Lord Denning MR in his dissenting judgment, which statement of the law was accepted by the House of Lords in *Sorrell v. Finch* [1977] AC 728, and referred in *Kuldip Singh & Anor v. Lembaga Letrik Negara & Anor (supra)*, *Dato’ Seri Au Ba Chi & Anor v. Malayan United Finance Bhd & Anor (supra)* and *OCBC Bank (Malaysia) Bhd & Ors v. Lee Lee Fah & Ors & Another Appeal (supra)*, amongst others). “Once a solicitor holds money in trust for his client or any other party for a purpose, it does not matter whether the amount is sufficient to be utilised for that purpose. The money remains to be in trust” (*Selvaratnam Vellupillai v. Dr Javabalan Karrupiah* [2009] 1 CLJ 872; [2009] 1 MLJ 794 per Zaki Azmi CJ, delivering the majority judgment of the court). Therefore, it is beyond argument that a stakeholder is a trustee and that the breach of a stakeholding term is not just a breach of undertaking but also a breach of trust.

[32] And “failure to honour an undertaking is *prima facie* evidence of professional misconduct ...” (*Butterworth’s Corderyon Solicitors* para. 903). The breach of an undertaking has also been variously held as grossly improper conduct (*Law Society of Singapore v. Lim Kiap Khee, supra*), as misconduct (*Cordery on Solicitors* 8th edn. at p. 319), and as conduct unbefitting an advocate and solicitor (*Au Kong Weng v. Bar Committee, Pahang* [1980] 1 LNS 4; [1980] 2 MLJ 89).

[31] Based on the above, it is irrefutable that the appellant cannot deny that he is obliged to keep the sums deposited with him on the undertaking that the funds would not be released until the due diligence process is finalised. The due diligence failed, and the sale had to be stopped as the respondent found that the sports toto license was incapable of being transferred until such time when the Ministry of Finance gives its consent and that the license did not belong to the company, the subject matter of acquisition. The sums deposited with the appellant should not have been released and there is no evidence that the respondent agreed to waive this condition.

[32] In the circumstances, I do not find any errors justifying appellate intervention on the issue of the order directing the appellant to repay the respondent the stakeholder sum deposited with the firm. The firm should have followed the terms of the stakeholder and withstood any attempt by any party to have the sums released to them. Even if these sums were to be released, the appellant should have then obtained written confirmation from

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- A the solicitors for the respondent of the agreement to waive the stakeholder condition. Otherwise, the appellant would be incurring personal liability for breaching the terms of the stakeholder agreement.

Alleged Breach Of Natural Justice – Denial Of The Right To Call Four Other Witnesses

- B [33] I do note that the appellant now claims that the Sessions Court had failed to be given them the opportunity to call additional witnesses at trial.

- C [34] The appellant claims that the firm was not given an opportunity to call their witnesses and present their case before the learned Sessions Court Judge. Learned counsel complained that the respondent had failed to serve on them the witness statements before the proceedings and was only given a copy of the respondent's witness statements on the day of the trial.

- D [35] I agree that generally ample latitude should be given to litigants to present their case before the courts. That is an accepted principle of justice that parties be given an opportunity to present their case. However, this is not an absolute right and parties are required to act in accordance with the directions of the courts and to comply with the Rules of Court applicable at the material time.

- E [36] In this case, the appellant did not comply with any of the directions given by the Sessions Court Judge during case management. The appellant did not file any list of witnesses, no bundle of documents and did not prepare and file witness statements before trial as directed by the learned Sessions Court Judge.

- F [37] I also note during the trial, he did not tender any list of witnesses, did not produce their witness statements, and did not identify who the firm intends to call. The appellant only stated the firm wanted to call four other witnesses without identifying who they are and whether these individuals were willing and able to attend the trial. The appellant during this appeal informs this court that these witnesses were co-operative, but this would mean that, at the very least, the witness statements of these individuals could have been filed on the day of the trial and produced to the Sessions Court Judge for his consideration. This was never done by the appellant. There was a complete disregard of all directions given by the court without any reasonable explanation tendered to justify the indolent behaviour by the appellant.

- I [38] I note the warning that must be heeded by all trial courts as seen in *Rekha Munisamy v. Ortus Expert White Sdn Bhd & Anor* [2021] 7 CLJ 353. However, in this case, I do not find that the learned Sessions Court Judge had failed to exercise his discretion correctly. The learned Sessions Court Judge had given ample opportunity to the appellant to present its case. The firm was given all reasonable opportunity to comply with the directions of

the Sessions Court Judge. Even when the firm failed to file the list of witnesses, the bundle of documents and the witness statements, the appellant was allowed the opportunity to give evidence. However, regarding the alleged four witnesses, I find that this was merely a ploy to delay proceedings. The appellant, even till today, failed to identify clearly who these four individuals were and what they will establish that could assist the appellant's case.

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[39] I must also take this material fact into consideration. The appellant is not a layperson. The appellant is a firm of advocates and solicitors, and he even admits and submits during trial, he is a seasoned litigator and is well-versed with the legal process. I, therefore, do not find any reasonable reason justifying the delay by the appellant in complying with the Sessions Court's directions. The appellant would have surely realised the razor-sharp sword hanging over his head suspended by a single strand of hair if he chose not to comply with the directions of the court. He cannot now complain about the consequences of his own wrong.

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[40] Even at the date of this appeal, no such witness statements were ready, and the said appellant did not even apply for leave to adduce additional evidence to support its appeal and provide sufficient evidence to support the existence of these alleged witnesses.

[41] For the above reasons, I do not find any errors as alleged by the appellant that justify appellate intervention on the above issues.

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Appeal On Damages Concerning Due Diligence And For Fraud/Misrepresentation

[42] Notwithstanding the above, I agree with the appellant that the Sessions Court Judge should not have ordered that he pay the sum of RM40,000 being damages or costs incurred for the aborted acquisition/due diligence costs and general damages of RM60,000 for the alleged misrepresentation.

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[43] I do not find that the respondent has proven their claim for misrepresentation. The learned Sessions Court Judge had erroneously found that the appellant was not acting for the vendor based on the letter dated 26 January 2022 from Messrs Oh Teik Keng & Partners. The said firm had only confirmed that they were now taking over the conduct of the matter and directed the stakeholder sum previously received by the appellant, to be returned to the respondent. This does not mean that he was not acting for the vendors or the company. That could not justify the claim of misrepresentation or fraud as alleged by the respondent.

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[44] I also find that the order for general damages is excessive. I believe that in this case, exemplary damages is justifiable as the appellant is a firm of solicitors and of sufficient seniority to be in the position to be aware of the seriousness of sums held by solicitors on behalf of clients as stakeholders. These directions must be complied with and failure to do so could attract

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- A legal and disciplinary consequences. However, the sums ordered is excessive and I therefore reduce it to the sum of RM10,000 being a fair amount that should be paid by the appellant as exemplary damages.

[45] It must be reminded that the appellant had only stated in its letter that in his letter dated 10 September 2021, the firm had only stated that:

- B Our client holds a license to operate a Sports Toto outlet at Jalan Pasar Baharu, Kuala Lumpur.

Our client is offering to sell the entire company for the sale price of RM1,400,000.00 ...

- C If you are interested, kindly pay a deposit of RM300,000.00 to us as solicitors for our client to commence the acquisition process.

This deposit payment is non-refundable as long as our client is able to show that the average sales per month in 2019 is RM600,000.00

- D [46] This was followed with a subsequent letter dated 21 September 2021 where the firm stated:

We are acting for the shareholders of Sungai Mesar Sdn Bhd ...

Parties have also shown that the gaming license was issued to Sungai Mesra Sdn Bhd and in the specific name of Law Chin Boo @ Low Chin Boo.

- E [47] The only representation that appears in the correspondence, even if this is to be entertained, is what appears in the letter dated 16 December 2021 issued by Messrs Ricky Tan & Co which states:

- F We are instructed to state that at all material time, your client and/or your client's intermediary has represented to us to our client that the said license issued by the Ministry of Finance is attached to the company itself only and not to MR LAW as PP.

[48] Subsequently, Messrs Ricky Tan & Co, then alleged in its letter dated 14 January 2021 that:

- G That on/or around 12.1.2022, our client was informed by the shareholder of Sungai Mesra Sdn Bhd, Mr Law Chin Boo that he has never given any instruction to you to act on behalf of the company and to collect the deposit in the sum of RM300,000.00 from our client for the aforesaid matter.

- H [49] I also note that Mr Law Chin Boo subsequently issued two letters through its new solicitors, Messrs Oh Teik Keng & Partners with the following date and contents:

(i) 26 January 2020

- I We are instructed to act for Mr Law Chin Boo @ Low Chin Boo and Mr Lim Ah Loon.

...

We are further instructed that to return to you the deposit of RM50,000.00 and January 2022 rental of RM13,500.00 you paid to our clients todate, on the condition that you refund the entire deposit amounting to RM300,000.00 to the said Purchaser by 5.00 pm Friday 4th February 2022.

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(ii) 7 February 2022

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Our clients have instructed us to return the deposit of RM50,000.00 together with the January 2022 rental of RM13,500.00 received from our client's erstwhile lawyers Messrs Lim & Keong.

[50] The important part of the letter dated 7 February 2022 is the confirmation that the appellant was the lawyer of Mr Law Chin Boo and the said firm was subsequently replaced by the new firm of Messrs Oh Teik Keng & Partners.

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[51] Therefore, it cannot be said that the appellant was not representing the license holders, Mr Law Chin Boo or the company known as Sungai Mesra Sdn Bhd. He was only replaced by the firm of Messrs Oh Teik Keng & Partners. It is worth repeating what was said by the said firm:

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Our clients have instructed us to return the deposit of RM50,000.00 together with the January 2022 rental of RM13,500.00 received from our client's erstwhile lawyers Messrs Lim & Keong ... (emphasis added)

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The contents of this letter were simply ignored by the learned Sessions Court Judge.

[52] This position is also contradicted by the fact that the said Law Chin Boo @ Low Chin Boo did receive the cheque of RM50,000 from the appellant's client's account and the rentals of RM13,500. This was subsequently returned to the appellant with the instruction that the stakeholder sum be returned to the respondent. This factor was also ignored by the learned Sessions Court Judge.

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[53] Another important factor I have considered is that the said Law Chin Boo @ Low Chin Boo was not produced by the respondent to explain the WhatsApp relied on by the respondent and to explain the contents of the letters issued by the lawyers referred to earlier.

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[54] Therefore, the decision of the Sessions Court that the appellant had misrepresented his authority cannot be sustained. The evidence produced shows that he had in fact acted for the said Law Chin Boo @ Low Chin Boo but was subsequently replaced by the client as seen in the letter dated 7 February 2022. Otherwise, the new firm would not have used the words "erstwhile solicitors". It is undisputed that Mr Law Chin Boo @ Low Chin Boo is the party holding the said license and the sum of RM50,000 was paid to him by the appellant.

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A [55] I also find that the only representation that was made during the negotiations is as what appears in Messrs Ricky Tan & Co's letter:

We are instructed to state that at all material time, your client and/or your client's intermediary has represented to our client that the said license issued by the Ministry of Finance is attached to the company itself only and not to MR LAW as PP.

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I stress the word intermediary was used by Messrs Ricky Tan & Co. This is not therefore a simple case as suggested by the respondent.

C [56] If there is any misrepresentation that could be acted upon is that of a potential claim against Law Chin Boo @ Low Chin Boo or the company holding the said license. The claim is not against the appellant who was only acting as solicitors for the said Low Chin Boo. As I said earlier, the firm had wrongly released the sum of RM300,000 that should have been held as a stakeholder, but the said firm is not guilty of misrepresentation either negligently or fraudulently as alleged in this case.

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E [57] Therefore, the finding of the learned Sessions Court Judge that appears in paras. 62 to 72 of the grounds of judgment is wrong. The Sessions Court had failed to consider the above material consideration that would have shown that the firm is not guilty of misrepresentation as alleged. The appellant had acted for Mr Low Chin Boo. I find this finding is not sustainable. Surely the new firm would not have used the words "erstwhile solicitors" of Mr Low Chin Boo in the letter dated 7 February 2022. As I have indicated earlier, the cheques issued by the said appellant to Mr Low Chin Boo were also not considered by the lower court.

F [58] It is therefore wrong for the learned Sessions Court to merely rely on the WhatsApp conversations without the explanation of Mr Low Chin Boo. Mr Low Chin Boo was not produced to explain these contradictions to support the respondent's claim. It must be noted that the burden of proof lies at all material times with the respondent to prove its claim against the appellant and not the other way around.

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[59] In view of these documents, it cannot be said that the appellant did not act for the license holder, Mr Low Chin Boo. The letters of Messrs Oh Teik Keng & Partners, that I referred to earlier, instead shows and confirms the appellant did act for Mr Low Chin Boo.

H [60] I therefore find that this is a suitable case for appellate interference on this issue. In view of the documents before this court, I find that the Sessions Court Judge should not have made the finding on liability on the issue of fraudulent misrepresentation and the claim for the loss arising from the due diligence expense claimed by the respondent.

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Conclusion – Appeal Against Decision After Trial

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[61] For the above reasons, I only allow the appeal partly concerning the claim for damages of RM40,000 and exemplary damages to the sum of RM60,000. I find that the appellant is not guilty of fraudulent misrepresentation as found by the learned Sessions Court Judge and should not be held liable for the costs of due diligence incurred by the respondent.

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[62] I however confirm that the appellant is liable to pay the sum of RM300,000 to the respondent and also direct the appellant pay to the respondent the sum of RM10,000 as exemplary damages for the said wrong.

[63] The orders concerning interest follow the orders of the Sessions Court and the costs of the lower court remain as ordered earlier. The costs of the appeal shall be equally borne by both litigants.

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